IN THE

Supreme Court of the United States

October Term, 1942, No. 3[illegible].

LE ROY J. LEISHMAN,
Petitioner,

vs.

ASSOCIATED WHOLESALE ELECTRIC COMPANY,
Respondent.

PETITION FOR REHEARING.

SAMUEL E. DARBY, JR.,
Counsel for Respondent.

IN THE

Supreme Court of the United States

October Term, 1942, No. 332.

LE ROY J. LEISHMAN,
Petitioner,
vs.
ASSOCIATED WHOLESALE ELECTRIC COMPANY,
Respondent.

PETITION FOR REHEARING.

The opinion of this Court, announced February 15, 1943, states that certiorari was granted in this case "to settle the important question of practice presented under the Rules of Civil Procedure".

At the argument before the Court, counsel for respondent agreed, and here repeats, that in a matter as important as the Rules of Civil Procedure it was indeed highly desirable that this Court clarify any ambiguity that might exist in the Rules because of its effect on practice thereunder.

This petition for rehearing is not presented for the purpose of resisting the conclusion arrived at and announced in this Court's opinion in this case, but rather to point out to the Court the new and greater ambiguities in the Rules, which, it is believed, have been injected therein by the opinion, and to urge that this Court take advantage of the present opportunity for complete clarification of the rules applicable to appeal practice which, by the grant of certiorari, this Court undertook.

Thus, as a result of the opinion in this case, the following questions inevitably are presented, and it is hoped that answer thereto, by grant of the rehearing hereby sought, will completely clarify the matter.

1. *Does a motion under Rule 52(b) in and of itself toll the statute (28 U. S. C. 230) fixing the time for appeal after entry of judgment?*

In its opinion this Court said:

> "We think that petitioner's time to appeal did not begin to run until the disposition of his motion under Rule 52(b) on June 9, 1941, and accordingly that his appeal was timely."

This language is unequivocal, and, without more, would seem to mean that *any* motion to "amend" the findings or "make additional findings", or "amend the judgment", as permitted by the rule, would toll the appeal statute regardless of the *nature* or *extent* of the amendment requested. However, the next two sentences of the opinion throw doubt upon whether or not such meaning was intended. Thus, the opinion continues:

> "The motion was not addressed to mere matters of *form* but raised questions of *substance* since it sought *reconsideration* of certain basic findings of fact *and the alteration of the conclusion* of the court. In short the *necessary effect* was to ask that rights already *adjudicated* be *altered*."*

It is believed that this language clearly implies that it is the *character* or *extent* of the amendment sought by a motion under the rule that determines whether or not the motion tolls the appeal statute. Necessarily, therefore, the inclu-

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* Emphasis ours throughout this petition.

sion of the above quoted two sentences in the opinion presents the question:

2. *For a motion under Rule 52(b) to toll the appeal statute, is it necessary that the motion request an amendment of the judgment or an amendment of the findings, which, if made, would necessitate amendment of the judgment?*

In other words, is it *the filing of the motion* under Rule 52(b) that is controlling, or is it the *extent and nature of the requested amendment* which controls?

Finally, the decision of the Court is believed to create ambiguity as to the distinction, if any, between "reconsideration" and "new trial".

It has long been recognized that there is no distinction between "reconsideration" and "rehearing". Rule 59 apparently uses the terms "rehearing" and "new trial" synonymously by providing (Rule 59(a)(2)) that:

> "A *new trial* may be granted • • • (2) in an action tried without a jury, *for any of the reasons for which rehearings have heretofore been granted in suits in equity in the Courts of the United States*".

In this Court's opinion in the present case, and in the portion thereof last above quoted, it is pointed out that petitioner's motion was not addressed to mere matters of *form*—

> "but raised questions of substance since it sought *reconsideration of certain basic findings of fact* and the alteration of the conclusion of the court"

and pointed out that the "necessary effect" of the motion

> "was to ask that rights already *adjudicated* be *altered*".

This, of course, is a fact in the present case. Petitioner's motion under Rule 52(b) *did* seek "reconsideration" of the evidence before the District Court upon which that Court's opinion was based. In other words, the practical as well as the legal effect of petitioner's motion, as this Court plainly recognized, was that it constituted a motion for *reconsideration*, viz: *rehearing*, viz: *"new trial" under Rule 59*. However, at the end of its opinion this Court said: "The motion was *not* one for a new trial • • •" and took cognizance of the fact that had it been it would have been untimely because it was filed more than ten days after the entry of the judgment (Cf. Rules 6(b) and 59(b)).

Therefore, it is apparent that although Rule 59, by effect and intended implication, includes "rehearing" under the designation "new trial", the opinion of this Court either draws an unobvious and unexplained distinction between "reconsideration", on the one hand, and "rehearing" and "new trial", on the other, or predicates its conclusion that petitioner's motion under Rule 52(b) "raised questions of substance" upon the fact that the motion asked for "reconsideration" (viz: rehearing, new trial), whereas the last paragraph of this Court's opinion states that petitioner's motion was *not* for a new trial. Necessarily, therefore, this presents the question—

3. *Is a motion for "reconsideration" or for "rehearing" a motion for a "new trial", the attributes of which are prescribed by Rule 59 of the Rules of Civil Procedure?*

The wording of the rule, and the complete absence elsewhere in the Rules prescribing the procedure for applications for "reconsideration" or "rehearing", indicates that it was intended by the term "new trial" to include "reconsideration" and "rehearing", and each of them, if there is any distinction between them.

Therefore, it will be seen that the decision of this Court in this case still leaves appeal practice under the Rules in as much an ambiguous and uncertain condition as it was before, and adds further and perhaps greater ambiguity and uncertainty.

Conclusion.

In reaching the conclusion that a motion under Rule 52(b) tolls the appeal statute, this Court undoubtedly considered the fact that the statute prescribes in clear, unambiguous language the period of time after entry of judgment within which an appeal may be taken; and that Rule 6(b) of the Rules expressly excludes from the power of the Court enlargement of "the period for taking an appeal as provided by law". This Court likewise undoubtedly was cognizant of the fact that under the provisions of Rule 6(b) the time within which a motion under Rule 52(b) may be brought *may* be enlarged as often and for as long a period or periods as the Court in its discretion may determine. Finally, this Court was undoubtedly cognizant of the fact that by its decision in the present case the period within which an appeal could be taken after entry of the judgment, which heretofore was considered to be *fixed with certainty* by the statute as starting to run with the entry of the judgment, hereafter is *indefinite and uncertain* and dependent upon a *permissive* motion, the time for bringing which, though initially fixed by the rule, may be extended without limitation other than the discretion of the District Court.

It may be that this Court concluded that liberality in judicial procedure warranted this marked departure from the many prior decisions of the Court to the effect that the time fixed by the statute within which an appeal may be taken may not be extended by waiver, agreement of the par-

ties, or by order of the Court (see the illustrative authorities cited on page 2 of our main brief). On the other hand, it may be that this Court, in seeking to safeguard a litigant's right to appeal, did not fully consider the effect upon judicial procedure hereafter that inevitably will result from its opinion in this case. We present no argument on either aspect of the matter.

Nor do we suggest that a reargument be had unless the Court desires it.

In view of the foregoing considerations, however, it is believed and respectfully submitted that reconsideration and clarification should be had.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Respondent.

Certificate.

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

SAMUEL E. DARBY, JR.

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SUPREME COURT OF THE UNITED STATES.

No. 332.—October Term, 1942.

LeRoy J. Leishman, Petitioner, vs. Associated Wholesale Electric Company, a Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 15, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

The question in this case is whether petitioner appealed to the Circuit Court of Appeals within the time provided by law (28 U. S. C. § 230).

This is a suit brought by petitioner for infringement of certain claims of a reissue patent. The district court made findings of fact that the claims in issue did not embody any invention over the prior art and entered judgment dismissing the complaint on May 1, 1941. On May 28, 1941, after securing an enlargement of time under Rule 6(b) of the Rules of Civil Procedure (28 U. S. C. A. following § 723c), petitioner filed a motion under Rule 52(b)[1] asking that the findings "be amended and supplemented". Petitioner requested that some of the findings relating to non-invention be amended in certain respects set out in the motion so as to show invention and to include a specific finding that the claims in issue did define invention over the prior art. Supplemental findings, intended to dispose of various other defenses asserted by respondent but not passed upon by the court, were also requested. The motion concluded with the statement that: "Consistently with these findings, the conclusions of law should be amended to state that the claims . . . in suit are valid; that an injunction shall issue in the usual form, and that there be an accounting for past infringement." This motion was denied on June 9, 1941.

[1] So far as is here material Rule 52(b) provides: "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly."

On September 4, 1941, petitioner filed his notice of appeal in the district court.[2] The Circuit Court of Appeals *sua sponte* held it had no jurisdiction because the appeal was taken more than three months after the entry of judgment, contrary to 28 U. S. C. § 230. In so holding that court recognized the general rule that where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion.[3] But this case was differentiated on the ground that the instant motion was not one to amend the judgment but merely one to amend and supplement the findings and conclusions. 128 F. 2d 204. We granted certiorari to settle the important question of practice presented under the Rules of Civil Procedure.

We think that petitioner's time to appeal did not begin to run until the disposition of his motion under Rule 52(b) on June 9, 1941, and accordingly that his appeal was timely. The motion was not addressed to mere matters of form but raised questions of substance since it sought reconsideration of certain basic findings of fact and the alteration of the conclusions of the court. In short the necessary effect was to ask that rights already adjudicated be altered. Consequently it deprived the judgment of that finality which is essential to appealability. *Cf. Zimmern* v. *United States*, 298 U. S. 167; *Dept. of Banking* v. *Pink*, — U. S. — (No. 466 this Term). It is immaterial that petitioner did not specifically request the amendment of the judgment, and the distinction based on this failure to request by the court below is artificial and untenable. If the motion had been granted and the requested amended and supplemental findings made, the judgment would have to be amended or altered to conform to those findings and the conclusions resulting from them. We conclude that a motion under Rule 52(b) such as the instant one which seeks to amend or supplement the findings of fact in more than purely formal or mechanical aspects tolls the appeals statute, and that the time for taking an appeal

[2] This is the proper method of taking an appeal. Rule 73(a).

[3] Morse v. United States, 270 U. S. 151, 153-54, and cases cited. Compare Joplin Ice Co. v. United States, 87 F. 2d 174; Suggs v. Mutual Ben. Health & Accident Ass'n, 115 F. 2d 80; Neely v. Merchants Trust Co., 110 F. 2d 525; United States v. Steinberg, 107 F. 2d 124. See also Citizens Bank v. Opperman, 249 U. S. 448; Gypsy Oil Co. v. Escoe, 275 U. S. 498; Pfister v. Northern Illinois Finance Corp., — U. S. — (Nos. 26-27 this Term).

runs from the date of the order disposing of the motion. Cf. *Continental Oil Co.* v. *United States*, 299 U. S. 510.

The motion was not one for a new trial under Rule 59 and respondent's argument, based on that premise, that it was not filed in time,[4] is not pertinent.

The judgment below is

Reversed.

[4] The 10 day limit for filing fixed in Rule 59 cannot be enlarged under Rule 6(b) except as provided in subsection (c) of Rule 59.